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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ELIEZER KAPUYA, Plaintiff and Appellant, v. BEVERLY MEDICAL ASSOCIATES et al., Defendants and Respondents.	B204970 (Los Angeles County Super. Ct. No. BC358661)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed.

Law Office of Alan Goldberg and Alan M. Goldberg for Plaintiff and Appellant

Taylor Blessey and Barbara M. Reardon for Defendants and Respondents.

Eliezer Kapuya appeals from summary judgment entered against him in this wrongful death/medical malpractice action arising from the death of his mother. We find no triable issue of material fact and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The following facts are undisputed. Appellant's mother, Estrea Berro, was 87 years old when she was first evaluated by respondent Dr. Alan Metzger for knee problems. Dr. Metzger found significant orthopedic problems, including progressing loss of bone density, dementia, and hypertensive heart disease. Dr. Metzger prescribed nasally administered medication to improve Mrs. Berro's bone density, but she was often noncompliant. Dr. Metzger last saw Mrs. Berro in March 2002. At that time, she had developed diffuse osteoporosis and her dementia had progressed.

Appellant transferred his mother's care to Dr. Swamy Venuturupalli, who examined her in July 2004, when she was 92 years old. Dr. Venuturupalli saw Mrs. Berro again in October and December of that year. During this time, he considered recommending medication called Zometa to treat her ongoing osteoporosis. This medication is administered by intravenous infusion. Generally used to treat patients with bone cancer, this medication was increasingly being prescribed for osteoporosis in patients unable or unwilling to take oral or nasal medication.

Over the next several months, Dr. Venuturupalli discussed with Mrs. Berro's family the treatment options for her osteoporosis: (1) no intervention, which was associated with increased mortality due to substantial risk of falling; (2) oral medication, which presented the risk of aspiration because of Mrs. Berro's dementia; and (3) infusion therapy involving Zometa. The family was told that the only known risk of Zometa infusion therapy was the development of flu-like symptoms.

When Dr. Venuturupalli saw Mrs. Berro in March 2005, she was using a wheelchair. For this reason, he reconsidered the necessity of treating her osteoporosis with Zometa. Then, in August 2005, Mrs. Berro was brought to his office with a wrist fracture with no apparent trauma. This non-traumatic fracture caused Dr. Venuturupalli

to again consider treating her osteoporosis. Given her advanced dementia, he considered Mrs. Berro a poor candidate for oral Fosamax, which requires substantial cooperation from the patient. He once again recommended Zometa infusion.

Mrs. Berro saw Dr. Venuturupalli again on October 11, 2005. Appellant's wife told the doctor that every time Mrs. Berro stood from a sitting position, she screamed in pain. Dr. Venuturupalli's examination revealed tenderness in the lower lumbar spine, and he was concerned about possible spinal fractures. That, in combination with the non-traumatic wrist fracture and the fact that she had lost weight since her last visit, convinced him that Mrs. Berro's osteoporosis put her at high risk for hip fracture.

Mrs. Berro's family consented to the Zometa infusion therapy, which was administered that day. Dr. Venuturupalli asked appellant and his wife to supervise Mrs. Berro during the infusion because she was prone to violent outbreaks. The infusion was completed at approximately 6:00 p.m. During the infusion, Mrs. Berro had an episode of vomiting. She was monitored for 10 minutes after the infusion, and then sent home with her family.

About three hours later, Mrs. Berro's family called Dr. Venuturupalli and reported that she was vomiting "incessantly." The doctor prescribed medications and told her family to monitor her condition, making sure she had adequate fluids. He advised them to call him if her condition worsened.

The following morning, Dr. Venuturupalli called to check on Mrs. Berro's condition. Appellant's wife told him that Mrs. Berro had some vomiting episodes during the night, but seemed to be improved in the morning. She also told him that Mrs. Berro appeared to be having "'shallow' respirations." She asked if she should take Mrs. Berro to the emergency room, and Dr. Venuturupalli told her to do so "if she did not think that Mrs. Berro looked right because she is frail and elderly."

At 10:00 a.m., Dr. Venuturupalli received a telephone call advising him that Mrs. Berro had been rushed to the emergency room where she was pronounced dead. She was 93 years old at the time of her death.

Appellant brought this wrongful death action against Dr. Venuturupalli, Dr. Metzger, and Beverly Medical Associates, the medical group in which both doctors practiced (collectively respondents). Respondents moved for summary judgment, which was granted. This is a timely appeal from the judgment.

DISCUSSION

I

A defendant may move for summary judgment on the ground that the action has no merit. (Code Civ. Proc., § 437c, subd. (a); all statutory references are to this code unless otherwise indicated.) The defendant meets his or her burden of showing that a cause of action has no merit by showing "that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (§ 437c, subd. (p)(2).) If the defendant makes the requisite showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to that cause of action. (*Ibid*.) We review an order granting a motion for summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.)

Appellant seeks damages for the wrongful death of his mother. "A cause of action for the death of a person caused by the wrongful act or neglect of another" may be asserted by the decedent's surviving children. (§ 377.60.) Under this section, "the plaintiff must prove the death was 'caused by' the defendant's wrongful act or neglect, i.e., the wrongful act or neglect was a cause in fact of the death." (*Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1497-1498.) To constitute a "cause in fact," the wrongful act must be a "substantial factor in bringing about" the death. (*Id.* at p. 1498.)

In their motion for summary judgment, respondents asserted appellant could not establish the element of causation. "In a medical malpractice action the element of causation is satisfied when a plaintiff produces sufficient evidence 'to allow the jury to infer that in the absence of the defendant's negligence, there was a *reasonable medical probability* the plaintiff would have obtained a better result.'" (*Espinosa v. Little Co. of*

Mary Hospital (1995) 31 Cal.App.4th 1304, 1314-1315.) Thus, to show that a patient's death was caused by medical negligence for purposes of the wrongful death statute, a plaintiff must establish a "reasonable medical probability" that the negligence was sufficient of itself to bring about the death. (*Bromme v. Pavitt, supra,* 5 Cal.App.4th at pp. 1498-1499.)

The facts recounted in our factual summary were contained in respondents' separate statement in support of their motion, and were undisputed by appellant. Respondents relied on portions of medical records maintained by Dr. Venuturupalli, deposition testimony of Dr. Venuturupalli, and the declaration of Dr. Charles Sharp.

Dr. Sharp reviewed Mrs. Berro's medical records, and the deposition testimony of appellant, appellant's wife, and Dr. Venuturupalli. Based on his training and experience, and his review of these materials, he expressed the opinion that respondents "met the applicable standard of care at all times." Dr. Metzger and Dr. Venuturupalli each appropriately monitored Mrs. Berro's developing medical conditions, including dementia and osteoporosis, and prescribed appropriate medications to treat these conditions in light of her advanced age; Dr. Venuturupalli documented appropriate indications for the use of Zometa with Mrs. Berro, including high risk for fracture and inability to take oral biphosphonates; Dr. Venuturupalli provided appellant, as Mrs. Berro's medical decision maker, with all information reasonably required for him to give his informed consent to administration of Zometa to Mrs. Berro, appellant gave his consent; and Dr. Venuturupalli used an appropriate dosage of Zometa under the circumstances, which was administered in an appropriate setting in an appropriate manner.

Dr. Sharp stated that in his expert opinion, "to a reasonable degree of medical probability," "no action or omission" on the part of the respondents, caused or contributed to the death of Mrs. Berro. He gave the following reasons: "a. The possible complications from the administration of Zometa include flu like symptoms, including fever due to inflammation and chills, bone pain and nausea. [¶] b. There have been no reported cases of death caused by the administration of Zometa for treatment of osteoporosis. The possible side effects of Zometa, if they occur can be a nuisance, but

they are not life threatening. [¶] c. As a result, the manner in which this patient died cannot be explained by reference to the known side effects of Zometa. [¶] d. Based on the records and deposition testimony, it is far more likely that this patient died as a consequence of some other cause probably related to her advanced age and multiple co-morbidities."

Appellant argues that Dr. Sharp's declaration lacked evidentiary value, based on lack of "knowledge of what is usually and customarily done by practitioners *under circumstances similar to those which confronted the defendant.*" (Italics in original.) Dr. Sharp stated in his declaration that he had subspecialty certificates in endocrinology and metabolism and geriatric medicine, that he was chief of the Outpatient Metabolic Bone Disease Clinic at Orthopedic Hospital from 1979 to 1984, and director of the Osteoporosis Treatment Center at the same facility from 1984 to 1988. He was "familiar with the standard of care for internists practicing in Southern California, and . . . with medical causation generally, and specifically as it concerns the care of elderly patients." This is sufficient to establish his familiarity with the relevant standard of care.

Appellant also argues Dr. Sharp applied the wrong causation standard in stating that "to a reasonable degree of medical probability," no action or omission by respondents caused Mrs. Berro's death. Citing three older cases, *Carrasco v. Bankoff* (1963) 220 Cal.App.2d 230, *Cullum v. Seifer* (1960) 1 Cal.App.3d 20 (disapproved on another ground in *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359), and *James v. United States* (N.D.Ca. 1980) 483 F. Supp. 581, appellant claims respondents were required to establish the absence of causation to "a reasonable medical certainty" because this action is based on a delay in treatment.[1] While the cited cases use the term "reasonable certainty" in discussing the quantum of proof required for medical negligence, they do not purport to establish a different standard for a physician to prove

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[1] The cited cases involved delays in treatment ranging from 53 days for a skin graft to nearly two years for removal of a tumor. Appellant's theory of delay in this case involves the hours between 5:00 p.m. when Mrs. Berro's blood was drawn to her death before 10:00 a.m. the next day.

his or her delay in treatment did not cause the harm. *Carrasco* warns that causation need not be established "with such absolute certainty that any other conclusion is excluded." (220 Cal.App.2d at p. 240.) But as *Cullum* warns, the evidence must be more than conjecture, or that which merely establishes a possibility of harm. (1 Cal.App.3d at p. 26.) Dr. Sharp applied the proper standard in giving his expert opinion that, "to a reasonable degree of medical probability," no action or omission by Dr. Venuturupalli caused or contributed to the death of Mrs. Berro.

Dr. Sharp's declaration, based on Mrs. Berro's medical records and relevant deposition testimony, established that respondents' actions were not the cause of Mrs. Berro's death. The burden then shifted to appellant to establish a triable issue of material fact on the element of causation.

II

Appellant's theory was that Mrs. Berro died from excess potassium, a condition called hyperkalemia, not from the administration of Zometa. Appellant's separate statement of disputed facts relies entirely on the declaration of Dr. Arkady Stern, who stated he was familiar with the standard of care for internists practicing in the Los Angeles area and "with medical causation generally, and specifically as it concerns the care of elderly patients." According to Dr. Stern, on Mrs. Berro's next to last visit to Dr. Venuturupalli on August 19, 2005, "she was displaying the signs of renal failure." He refers generally to exhibit A, Mrs. Berro's cumulative laboratory results, but does not identify what values in the August results show renal failure. Nor does he identify any symptoms of renal failure exhibited by Mrs. Berro. There is no foundation for his statement that Mrs. Berro was displaying signs of renal failure.

Dr. Stern next recounts that Dr. Venuturupalli ordered lab tests for Mrs. Berro on October 11, 2005, and notes there is no record whether the tests were ordered to be completed on an urgent basis or whether the doctor reviewed the results at any time prior to Mrs. Berro's death the following day. According to Dr. Stern, "When Mrs. Berro presented to Dr. Venuturupalli on October 11, 2005, given her recorded history of renal failure, and given the medications she was taking, Dr. Venuturupalli should have taken

immediate measures to determine if Mrs. Berro was suffering from excess potassium, a condition called hyperkalemia."

This statement contains the unsupported assumption that Mrs. Berro had a recorded history of renal failure, and adds to that a vague reference to "the medications she was taking . . . ." There is no foundation for the factors Dr. Stern asserts should have alerted Dr. Venuturupalli to the possibility that Mrs. Berro was suffering from hyperkalemia.

There also is no indication that Dr. Venuturupalli failed to take "immediate measures" to ascertain whether Mrs. Berro's laboratory results were in an appropriate range. As we have noted, exhibit A, the cumulative report upon which Dr. Stern relies, shows that the October 11 laboratory tests were performed at 5:00 p.m., and the results were printed at 1:54 p.m. the next day. Mrs. Berro died before 10:00 a.m. that day. Appellant submitted no evidence that Dr. Venuturupalli could have obtained any relevant test results before her death.

Dr. Stern describes hyperkalemia as a condition which occurs when the level of potassium in the bloodstream is higher than normal. According to Dr. Stern, most cases of hyperkalemia are caused by disorders that reduce the kidneys' ability to excrete potassium. Dr. Stern notes the blood test results from October 11 showed that "Mrs. Berro's potassium level was 7.2, which is extremely high and very dangerous. Such a potassium level is a grave medical emergency." Dr. Stern is basing his hypothetical diagnosis on laboratory results without any showing that they were available before the patient's death.

Dr. Stern described nausea as "the textbook symptom of hyperkalemia." According to Dr. Stern, "The potential for hyperkalemia should have become apparent when [Dr. Venuturupalli] was called by Mrs. Berro's family approximately three (3) hours after she left his office on October 11, 2005 with reports that Mrs. Berro was vomiting 'incessantly,' an obvious sign of hyperkalemia. At this point, Dr. Venuturupalli should have received Mrs. Berro's lab results on an urgent basis, or ordered that the lab contact him at once regarding any notable abnormalities, and had Mrs. Berro immediately

hospitalized for aggressive intervening treatment in the intensive care unit." His assertion that Dr. Venuturupalli should have suspected the patient had hyperkalemia is based on a generic symptom—nausea—which respondents' expert notes is also a common side effect of Zometa infusion. His suggestion that Dr. Venuturupalli should have sought lab results on an urgent basis disregards the fact that the blood was not drawn at a hospital, but in a medical office, at 5:00 p.m., and that Dr. Venuturupalli received the report of incessant vomiting at approximately 9:00 p.m. that night.

Dr. Stern concludes that in his medical opinion, Dr. Venuturupalli's conduct in not aggressively investigating and treating Mrs. Berro's confirmed hyperkalemia was below the applicable standard of care. "I am also of the opinion that Dr. Venuturupalli's conduct was a contributing factor in Mrs. Berro's death. My opinion is further supported by the comments from Mrs. Berro's daughter-in-law, Venus Kapuya, that Mrs. Berro, on the night prior to her death, was having shallow respirations, another textbook sign of hyperkalemia. If Dr. Venuturupalli had commenced the proper treatment of Mrs. Berro's hyperkalemia shortly after her visit on October 11, 2005, it is more likely than not that Mrs. Berro would not have expired on October 12, 2005."

Appellant does not—and cannot—cite to evidence that Mrs. Kapuya reported the patient's shallow breathing during the night of October 11. In their reply to appellant's opposition to summary judgment, respondents cite to Mrs. Kapuya's deposition testimony that when she spoke to Dr. Venuturupalli on the telephone on the night of October 11 to tell him about the vomiting, Mrs. Berro was not having any difficulty breathing. She also testified that there was a second call to the doctor that evening, but Mrs. Berro was not having any difficulty breathing at that point. To the extent Dr. Stern relied on Mrs. Berro's shallow breathing as an indication of hyperkalemia, his opinion was based on a faulty premise, and thus was without evidentiary value. (See *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-525.)

In summary, Dr. Stern's conclusion that Mrs. Berro suffered from hyperkalemia was based on a laboratory result which was not obtained until several hours after her death. Nothing but the potassium value in the laboratory report supports his theory. Dr.

Stern's assertion that this condition should have been suspected at the time Dr. Venuturupalli saw Mrs. Berro in his office, or at the time he received a telephone call from the family that evening, was based on an unsupported assumption that Mrs. Berro had renal failure, an erroneous belief that Mrs. Berro had shallow respirations during the night before her death, and her sole symptom of nausea and vomiting (which appellant admits is also a side effect from Zometa). Dr. Stern states in his declaration that "immediate hospitalization and treatment of a patient suffering from hyperkalemia is absolutely necessary." In Dr. Stern's opinion, Dr. Venuturupalli's treatment "was a contributing factor" of Mrs. Berro's death, and that if he had administered proper treatment, it is "more likely than not" that she would not have died that day. Yet he gives no indication what treatment would have been customary or proper, or whether there was any reasonable degree of medical probability that such treatment would have prevented Mrs. Berro's death. Giving this declaration its most liberal reading, it does not raise a triable issue of material fact that any act or omission by Dr. Venuturupalli was a substantial factor in causing Mrs. Berro's death.

Appellant argues that portions of the medical records submitted by respondents in support of their motion raise triable issues of material fact. These include a prescription form dated October 11, 2005, a notation on the laboratory report next to the potassium level for that date, the history of potassium levels shown on that report, and a statement in Dr. Venuturupalli's notes from October 11 that "[l]abs will be check[ed] prior to Zometa infusion." None of this was referenced in appellant's separate statement, nor did he bring it to the trial court's attention before the ruling on the summary judgment motion.

The rules dictating the content and form for separate statements are designed to permit trial courts to review complex summary judgment motions quickly and efficiently in order to determine whether material facts are disputed. (*Collins v. Hertz Corp*. (2006) 144 Cal.App.4th 64, 72.) To that end, the rules of court require a party opposing summary judgment to "state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title,

page, and line numbers in the evidence submitted." (Cal. Rules of Court, rule 3.1350 (f).) Here, appellant made no reference at all to this additional evidence in the trial court, in violation of the Rules of Court. The trial court had no obligation to "wade through stacks of documents" to determine whether there was a triable issue of fact, and we decline to do so on appeal. (See *Collins v. Hertz Corp., supra*, 144 Cal.App.4th at p. 72.)

Appellant acknowledged in the trial court that the only theory of liability for the other respondents, Dr. Metzger and Beverly Medical Associates, is respondeat superior, based on the conduct of Dr. Venuturupalli. In light of our conclusion that there is no triable issue of material fact as to the negligence of Dr. Venuturupalli, there can be none as to Dr. Metzger and Beverly Medical Associates. Summary judgment was properly granted in favor of respondents.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.